IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1967

No. 16

JERRY DOUGLAS MEMPA, *Petitioner*,

v.

B. J. RHAY, Superintendent, Washington State Penitentiary, *Respondent.*

No. 22

WILLIAM EARL WALKLING, *Petitioner*,

v.

WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES, *Respondent.*

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

The courts of the State of Washington, like all state jurisdictions and the United States Courts, have statutory authority granted by their respective legislatures and the Congress, concerning the procedures relating to the granting and revocation of probation to persons convicted of crimes.

Judgments of the Supreme Court of the State of Washington denying writs of habeas corpus under the Probation Act of the State of Washington (RCW 9.95.200-9.95.240)[1] are presented for review by this court upon writs of certiorari previously granted.

STATEMENT OF CASES

MEMPA v. RHAY, No. 16

The petitioner, Jerry Douglas Mempa, (hereinafter sometimes referred to as Mempa) had been involved in a number of serious crimes and offenses prior to his becoming seventeen years of age. When he was thirteen years old, Mempa was before the Juvenile Court for Spokane County on the charge of having committed a Burglary. He was detained in the Juvenile Detention Home in Spokane for one week, and then released on a probationary status. At fourteen years of age, he again appeared before the Juvenile Court on charges of Burglary and Malicious Vandalism and found by the court to be a delinquent child and committed to a state juvenile correctional institution at the Greenhill School at Chehalis, Washington. Mempa remained at that institution for approximately eight months when he was released to his parents. Within sixty days of his release, Mempa was found in possession of a device to start the motor of an automobile without a key, commonly known as a "hot wire." This resulted in his placement in a juvenile detention home from which he attempted to

[1]The text of the statutes are set forth in full in Appendix A.

break out along with several of the other children detained there. As a result, Mempa was again committed to the state correctional institution for juveniles at the Greenhill School in Chehalis, Washington. On March 24, 1958, Mempa was returned to the juvenile court of Spokane County from the Greenhill School as a result of his participation in a riot at that institution. He was returned as an "incorrigible" under the then existing statutory authority for the return of incorrigibles to the committing court. Thereafter, a petition was filed alleging Mempa to be a "psychopathic delinquent", and he was sent to the Eastern State Hospital at Medical Lake, Washington, near Spokane, for observation and diagnosis as to whether or not he was a "psychopathic delinquent" as defined by law. He was, thereafter, transferred to the Western State Hospital and the physicians of that institution were of the opinion that he was a "psychopathic delinquent" and he was returned to Spokane County. He was, thereafter, again sent to the Eastern State Hospital for observation and it was the opinion of that institution that Mempa was not a psychopathic delinquent. The court then dismissed the petition and Mempa was returned to his parents, M.R. 10-11.[1] During the proceedings on the petition, alleging Mempa as being a "psychopathic delinquent", he was represented by Mr. Paul Cooney, his court-appointed attorney. (M.R. 14, 32)

The first ten years of his life, Mempa was raised

[1]Wherever appearing in this brief, the designation M.R. refers to the transcript of record in *Mempa v. Rhay*.

and grew up with his grandparents. Thereafter, he resided with his mother and his stepfather in Spokane. Apparently, Mempa was permitted to drop out of school prior to the completion of the eighth grade of his education. (M.R. 11)

On April 28, 1959, at approximately 7:00 p.m., Mempa was taken into custody and placed in the Juvenile Detention Home in the City of Spokane on the basis of the charge of which he was thereafter convicted, and, as a result, he is now confined by the respondent. On the following day, as his probation officer was carrying on a conversation with him, and, at the same time, returning him to his place of detention within the home, the petitioner broke away from the probation officer and escaped from the Juvenile Detention Home. On May 1, 1959, without notice or hearing, the Juvenile Department of the Superior Court for Spokane County made its order remanding the case of the petitioner to the prosecuting authorities of Spokane County for appropriate proceedings under the provisions of the Criminal Code of the State of Washington.* In the company of

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*Mempa petitioned the Supreme Court of the State of Washington for a writ of habeas corpus contending that he had been denied due process when the juvenile court declined to exercise juvenile authority without notice or conducting a hearing. The Supreme Court of Washington in Cause No. 39048 agreed and ordered the matter referred to the juvenile court of the superior court for Spokane County for the purpose of conducting a hearing on the subject of the appropriateness of the declination of juvenile authority and to provide Mempa with the requirements of due process in such cases as set forth in *Dillenburg v. Maxwell*, 68 W.D. 2d 481, 413 P.2d 940 as modified on rehearing 70 W.D. 2d 325 (January 19, 1967). A hearing was held in the Superior Court for Spokane County and a finding was made that the declination of juvenile authority was appropriate when made and recommitting Mempa to the custody of the respondent.

his stepfather, the petitioner turned himself into the sheriff's office on May 18, 1959. (M.R. 13)

By information filed by the Prosecuting Attorney for Spokane County on May 26, 1959, Mempa was charged with having committed the crime of Taking a Motor Vehicle Without The Permission of The Owner contrary to the provisions of RCW 9.54.020. (M.R. 8)

Shortly following the filing of the Information the court appointed counsel, Mr. Willard Roe, to give aid and assistance to Mempa in his defense. (M.R. 9, 13)

The petitioner, in the company of his attorney, came before the Superior Court for Spokane County for arraignment on June 17, 1959. (M.R. 9) At that time, the petitioner entered a plea of "Guilty", to the crime of Taking A Motor Vehicle Without The Permission of The Owner as charged in the Information. (M.R. 10) Following the plea, the Prosecuting Attorney recited to the court, some of the prior experience of Mempa with the law and the details of the crime of which he then stood convicted. (M.R. 10 - 13) Then Mr. Willard Roe, the petitioner's court-appointed attorney made a plea to the court to grant the petitioner probation. Following some colloquy between the court and the petitioner, the court pronounced sentence which it suspended on the condition that the petitioner serve thirty days in the county

jail. (M.R. 18)[4] The court, in pronouncing sentence, stated: (M.R. 18)

> "The Court: Very well. It is the further judgment of the Court that you be confined in the institution for a maximum periord of ten years. Now, I am going to suspend every bit of that except thirty days. I want you to serve thirty days actually on this. I want to point out to you now that when you are released, you are going to be under observation not only of the juvenile officers, but of the state parole officers. Those men know their business. They are kindly disposed. They will be there for the purpose of seeing that you don't get back here again. Take advantage of this, or you are going to be back here. You are absolutely on your own now. Mr. Roe can't help you, and no one else can help you, and if you steal a car, you are going to Monroe and you are going to stay there. I would think that you would realize that this is a real opportunity, and that you would behave yourself from now on. * * *" (M.R. 18, 19)

The petitioner was then granted probation for a period of two years under the supervision of the State Board of Prison Terms and Paroles. (M.R. 20)

Approximately sixty days following the granting of probation to Mempa, he became involved in a Burglary on the evening of September 15, 1959 of

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[4]The Supreme Court of the State of Washington in *Mempa v. Rhay*, 68 Wn.2d 882, 883, 416 P.2d 104, 105, indicates that the imposition of sentence was deferred in Mempa's case, which we are of the belief was an incorrect assumption and that the trial court actually pronounced sentence but suspended its execution upon the observance of certain conditions. Although the difference between a deferred and suspended sentence is as stated in *Korematsu v. United States*, 379 U.S. 432 "one of trifling degree".

Mark's Auto Sales in the City of Spokane from which he and his companion removed a television set, radio, and three rifles. The Prosecuting Attorney for Spokane County then filed his motion for an order revoking probation with an affidavit attached setting forth the violation of the conditions of probation, and the matter was brought on for hearing before the court on October 23, 1959. (M.R. 24, 25)

At the time of the hearing in the Superior Court for Spokane County, on the motion for the revocation of probation, the petitioner was not represented by counsel, nor was he advised of a right to the appointment of counsel to give aid and assistance to him if he were without funds to employ his own counsel, nor did Mempa request the appointment of counsel, or to be afforded the services of the attorneys who had previously been appointed by the court to represent him.

During the course of the hearing on the revocation of the petitioner's probation, a portion of the affidavit setting forth the details of the petitioner's participation in the burglary of Mark's Auto Sales was read to him and he was then asked whether or not it was true and he responded in the affirmative. (M.R. 25) At the conclusion of the hearing, the court signed the order revoking the petitioner's probation and imposed a sentence of not more than ten years confinement which had previously been pronounced but the execution stayed. (M.R. 26)

Late in the year 1965, the petitioner, Jerry Mempa, made application to the Supreme Court of

the State of Washington for a writ of habeas corpus, (M.R. 1 - 3) to which the Attorney General, on behalf of the respondent, filed his return and answer. (M.R. 5 - 7). Following the submission of briefs by the parties, the matter was noted for hearing before the court and formal presentation of the matter was made by the Attorney General and the Supreme Court of Washington rendered its opinion on June 23, 1966. (M.R. 40 - 59) Certiorari was granted by this court on February 13, 1967. (M.R. 62)

WALKLING vs. WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES No. 22[5]

The petitioner, William Earl Walkling (hereinafter sometimes referred to as Walkling) was accused of having committed the crime of Burglary In the Second Degree in an Information filed in the Superior Court of the State of Washington for Thurston County on October 11, 1962. (W.R. 11)[6]

An arraignment proceeding was conducted in the petitioner's case in the Superior Court of the State of Washington for Thurston County on October 29, 1962. The petitioner was present in court at

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[5]Since the granting of certiorari in this case and on May 17, 1967, the petitioner was granted parole by the Washington State Board of Prison Terms and Paroles and released from the custody of the former respondent, B. J. RHAY, Superintendent of the Washington State Penitentiary. The petitioner is presently being supervised on parole and resides with his mother, Mrs. Phoebe Walkling, Rt. 1, Box 475, Centralia, Washington. The petitioner has made a motion for the change of respondents to reflect the parole of the petitioner and both the counsel for the respondent and the petitioner have entered into a stipulation that the change in the caption of the case may be effectuated to appropriately indicate the custody of the petitioner.

[6]Wherever appearing in this brief, the designation W.R. refers to the transcript of record in *Walkling v. Washington State Board of Prison Terms and Paroles* No. 22.

that time and was accompanied and represented by his attorney, W. N. Beal. After the court having advised the petitioner concerning his rights, he was asked what his plea was to the crime of Burglary In The Second Degree as charged in the Information, and the petitioner entered his plea of "Guilty". Following the petitioner's plea of Guilty, the attorney for Walkling, Mr. W. N. Beal, presented arguments to the court that the sentencing of the petitioner should be deferred and that he be granted probation. The court granted the request of counsel for Walkling and imposition of sentence was deferred for a period of three years from October 29, 1962, and the petitioner, Walkling, was granted probation on condition that he maintain "general good behavior", "make monthly reports to the Board of Prison Terms and Paroles" and, "abide by their rules and regulations." Also, as a condition of the deferral of sentence, Walkling, was required to serve ninety days in the Thurston County Jail with credit for time previously served, and, in addition, to pay his proportionate share of restitution and the costs of prosecution. (W.R. 13 and 14)

A bench warrant was ordered to be issued by the Superior Court for Thurston County for the arrest of Walkling on May 21, 1963, on the grounds that he had allegedly violated the terms of his probation by his failure to make his reports to his probation officer as required, and, that he had absconded from the jurisdiction of the State of Washington. Walkling's whereabouts were not known until Feb-

ruary 24, 1964 when he was arrested by the Sheriff of Lewis County Washington, and, an Information was filed in that county by the Prosecuting Attorney charging Walkling with having committed fourteen (14) counts of Forgery In The First Degree and fourteen (14) counts of Grand Larceny. The petitioner was transferred from the Lewis County Jail to the Thurston County Jail on April 16, 1964 on the basis of the bench warrant previously issued by the court. The petitioner was brought before the Superior Court of the State of Washington for Thurston County on May 12, 1964 for hearing on the petition of the Prosecuting Attorney for an Order Revoking the Order Deferring Sentence and granting the petitioner probation. At that time the petitioner requested that the matter be continued for the purpose of enabling him to secure the services of an attorney to assist him in the matter. The court granted Walkling's request and the hearing was continued to May 18, 1964 at 9:00 o'clock a.m. On May 18, 1964, the matter was again called for hearing at the prescribed time and the petitioner was present in court without counsel, but petitioner advised the court that Smith Troy, an Olympia Attorney was supposed to be present and represent him. The matter was then held in abeyance until 9:15 a.m. and it was again called and the defendant appeared without counsel and the court proceeded with the hearing. The petitioner's probation officer, one Clare Murray, gave testimony before the court concerning Walkling's violation of the terms of his probation. At the conclusion of the

hearing, the court being satisfied that the petitioner's probation should be revoked, entered its order revoking its deferral of the sentence and imposed sentence upon the petitioner's conviction on his plea of Guilty of the crime of Burglary In The Second Degree, sentencing the petitioner to a maximum term of imprisonment of not more than fifteen (15) years, such judgment and sentence being entered on May 18, 1964. (W.R. 6-9, 15-18)

A record was not made of what transpired at the hearing on the Prosecuting Attorney's petition for the revocation of Walkling's probation, and the Judge who presided at that hearing, the Honorable Raymond W. Clifford, is now deceased. However, the affidavit of the Deputy Prosecuting Attorney who presented the matter to the court, clearly indicates that Judge Clifford, as a matter of custom and practice, did not advise defendants appearing before the Court upon motions to revoke probation of a right to the assistance of counsel to be paid for at public expense. (W.R. 17, 18)

The petitioner made application, through counsel for the American Civil Liberties Union, to the Supreme Court of the State of Washington, for a writ of habeas corpus contending:

> "Petitioner's constitutional rights were violated at the hearing in the following manner. Petitioner was denied his right to the assistance of counsel in a hearing which resulted in his being imprisoned. At no time did he waive the assistance of counsel. On the contrary, he specifi-

cally requested such assistance on several occasions. A defendant charged with such activities as will result in a revocation of probation and impostion of a prison sentence is entitled to have the court appeint counsel to protect the petitioner's rights and the failure to do so, denies him due process of law in violation of the Washington State Constitution and the United States Constitution." (W.R. 1 - 2)

The matter came on before the Supreme Court of the State of Washington for hearing on October 7, 1966 at which time Walkling was represented by his present attorney, Mr. Evan L. Schwab, and the respondent was represented by Stephen C. Way, Assistant Attorney General. The court stated the issue in its order, thusly:

"1. Whether or not the petitioner's constitutional rights were violated upon the grounds that the superior court of the State of Washington, in and for the County of Thurston in Cause No. C-2941, prior to the hearing on the motion to revoke the petitioner's probation and impose sentence upon his conviction of the crime of Burglary In The Second Degree, did not advise him of the right to be provided with an attorney to give aid and assistance to the petitioner to be provided for at public expense." (W.R. 19)

The court concluded that the petitioner's application for a writ of habeas corpus should be denied assigning its reasons as follows:

"1. The application of William Earl Walkling for a writ of habeas corpus is controlled by this court's recent decision in *Mempa v. Rhay*, 68

W.D. 2d 871 and his constitutional rights were not violated on the grounds alleged for the reasons assigned in the decision by this court in *Mempa v. Rhay, supra.*" (W.R. 19 - 20)

The petitioner's application to this court for a writ of certiorari was granted on February 13, 1967. (W.R. 21)

ISSUES PRESENTED

Counsel for the petitioners, in their brief to this court, phrase the issues as follows:

"(1) Does the Fourteenth Amendment confer a right to counsel during a state court probation revocation proceeding?

(2) Does the Fourteenth Amendment confer a right to counsel at the sentencing and judgment stage of a state court criminal proceeding?

(3) If such a right to counsel exists, and in the absence of waiver, must counsel be appointed for a defendant unable to employ counsel?"

ARGUMENT OF COUNSEL FOR THE RESPONDENTS

I

RIGHT TO COUNSEL AT PROBATION REVOCATION HEARINGS

A. Sixth Amendment Considerations

SUMMARY OF ARGUMENT

The probation revocation hearings held in the petitioners' cases were not "criminal prosecutions" and they were not "accused" persons within the meaning of the Sixth Amendment to the Constitution as made applicable to the states through the Fourteenth Amendment to the Constitution of the United States.

The suspension of sentence and granting probation in criminal cases, is authorized by statute in all states and in federal jurisdictions.[1] There was a time when it was disputed as to whether or not the state and federal courts possessed the power, either inherently or arising from the common law, to suspend sentence. This issue was probably set to rest by the decision of this court in *Ex parte United States*, 242 U.S. 27, concluding that the federal judiciary was without authority to suspend sentence "upon considerations extraneous to the legality of the conviction" without legislative authority. This court, in *Ex parte United States, supra*, stated in part as follows:

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[1] 18 USC 3651 *et. seq.*

"Indisputably under our constitutional system the right to try offenses against the criminal laws and upon conviction to impose the punishment provided by law is judicial, and it is equally to be conceded that in exerting the powers vested in them on such subject, courts inherently possess ample right to exercise reasonable, that is, judicial, discretion to enable them to wisely exert their authority. But these concessions afford no ground for the contention as to power here made, since it must rest upon the propostion that the power to enforce begets inherently a discretion to permanently refuse to do so. And the effect of the propostion urged upon the distribution of powers made by the Constitution will become apparent when it is observed that indisputable also is it that the authority to define and fix the punishment for crime is legislative and includes the right in advance to bring within judicial discretion, for the purpose of executing the statute, elements of consideration which would be otherwise beyond the scope of judicial authority, and that the right to relieve from the punishment, fixed by law and ascertained according to the methods by it provided, belong to the executive department. * * *"

In 1925 the Congress of the United States enacted legislation authorizing "the courts of the United States" to suspend sentences and to grant, modify and revoke probation. The Act was first construed in *United States v. Murray*, 275 U.S. 347.

The probation statutes in the states provide for a variety of different procedures. Some of the states

expressly authorize the revocation of probation without conducting a hearing and, in some instances, without prior notice. Several of the state's statutes do not indicate whether a hearing on the revocation of probation is required or not. Others imply that a hearing should be held before the probation is revoked. Many of the statutes which require that hearings be held before probation may be revoked qualify this by indicating that the hearing may be summary or informal in character.[8]

In *Burns v. United States*, 287 U.S. 216 (1932) and *Escoe v. Zerbst*, 295 U.S. 490 (1935), this court set forth the principles and philosophies underlying the Federal Probation Act, which decisions, without doubt, have formed the basis for many of the decisions in the Circuit Courts of the federal judiciary and in the state courts construing the legal rights, remedies and procedures under the respective probation Acts.

In *Burns v. United States*, *supra*, the petitioner had been convicted of three counts of an Indictment and sentenced to terms of imprisonment on each count, the execution of the imprisonment on the last count having been suspended and he was granted probation. During the service of the sentence on the first count, Burns was brought before the district court by its order for the purpose of investigating a report that he had violated the terms of his probation. The district court found that Burns had

[8]Law and Practice in Probation and Parole Revocation Hearings; 55 Criminal Law, Criminology and Police Science, 1775.

violated the terms of his probation and the probation was revoked. The court of appeals affirmed and the Supreme Court of the United States granted certiorari.

Mr. Chief Justice Hughes, in his opinion for the court, stated in part, as follows:

> "* * * Probation is thus conferred as a privilege and cannot be demanded as a right. It is a matter of favor, not of contract. There is no requirement that it must be granted on a specified showing. The defendant stands convicted; he faces punishment and cannot insist on terms or strike a bargain. To accomplish the purpose of the statute, an exceptional degree of flexibility in administration is essential. It is necessary to individualize each case, to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion. The provisions of the Act are adapted to this end. It authorizes courts of original jurisdiction, 'when satisfied that the ends of justice and the best interests of the public, as well as the defendant, will be subserved, 'to suspend the imposition of execution of sentence' and 'to place the defendant upon probation for such period upon such terms and conditions as they may deem best.'
>
> "*There is no suggestion in the statute that the scope of the discretion conferred for the purpose of making the grant is narrowed in providing for its modification or revocation. The authority for the latter purpose immediately follows that given for the former, and, is*

in turn, equally broad. 'The court may revoke or modify any condition of probation, or may change the period of probation.' *There are no limiting requirements as to the formulation of charges, notice of charges, or manner of hearing or determination. No criteria for modification or revocation are suggested which are in addition to, or different from, those which pertain to the original grant.* The question in both cases is whether the court is satisfied that its action 'will subserve the ends of justice and the best interests of both the public and the defendant. The only limitation, and this applies to both the grant and any modification of it, is that the total period of probation shall not exceed five years * * *" (Emphasis ours.)

"The duty placed upon the probation officer to furnish each probationer under his supervision 'a written statement of the conditions of probation' and to 'instruct him regarding the same' cannot be deemed to restrict the courts' discretion in modifying the terms of probation or in revoking it. The evident purpose is to give appropriate admonition to the probationer not to change his position from the possession of a privilege to the enjoyment of a right. *He is still a person convicted of an offense, and the suspension of his sentence remains within the controls of the court* * * * (Emphasis ours)

"The question, then, in the case of the revocation of probation, is not one of formal procedure either with respect to notice or specification of charges or a trial upon charges. The question is simply whether there has been an

abuse of discretion, and is to be determined in accordance with familiar principles governing the exercise of judicial discretion." (Emphasis ours)

Burns had complained to the court regarding the summary nature of the hearing on the revocation of the probation. The court stated on this latter point:

> "The hearing was summary but it cannot be said that it was improper or inadequate, in view of the nature of the proceeding and of the particular point upon which the court rested its decision. The court revoked the probation upon defendant's admissions of his dereliction and it does not appear that there was abuse of discretion."

In *Escoe v. Zerbst, supra,* the petitioner was convicted of a crime upon his plea of Guilty to the Indictment and was sentenced to a term of imprisonment of four and one-half years. Sentence was suspended and he was granted probation for five years on certain conditions. Upon the report of the probation officer, Escoe's probation was revoked without a hearing and he was arrested and forthwith transported to the penitentiary. Escoe filed a petition for habeas corpus in the district court contending that his constitutional rights had been violated when he was not afforded a hearing on the revocation of his probation. The district court dismissed the petition for the writ which was affirmed on appeal. This court granted certiorari and, in the opinion for the court written by Mr. Justice Cardoza, the

following statements of philosophy relating to federal probation are set forth:

"Under the statute as amended as well as in its original form ,the probationer 'shall forthwith be taken before the court'. This mandate was disobeyed. The probationer, instead of being brought before the court which had imposed the sentence, was taken to a prison beyond the territorial limits of that court and kept there in confinement without the opportunity for hearing. For this denial of a *legal privilege* the commitment may not stand.

"In thus holding, *we do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose. Burns v. United States,* 287 U.S. 216, 77 L.Ed. 266, 53 S.Ct. 154 * * * (Emphasis ours)

"The privilege is no less real because its source is in the statute rather than in the Fifth Amendment. * * * Clearly, the end and aim of an appearance before the court must be to enable an accused probationer to explain away the accusation. The charge against him may have been inspired by rumor or mistake, or even downright malice. He shall have a chance to say his say before the word of his pursuers is received to his undoing. *This does not mean that he may insist upon a trial in any strict formal sense. Burns v. United States, supra. It does mean that there shall be an in-*

*quiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper. * * *"* (Emphasis ours)

Against this backdrop of the philosophy and rationale on the subject of probation, its grant and revocation and the application of constitutional principles pronounced in *Burns v. United States*, and *Escoe vs. Zerbst, supra*, a plethora of case law has developed in the state courts, and the circuit courts of the federal judiciary, concluding that not only the constitutional right to counsel, but other familiar principles of constitutional law are inapplicable to hearings on the revocation of probation, and the imposition of sentence.

In *Shum v. Fogliani*, — Nev. —, 413 P.2d 495 (1966) the appellant petitioned for a writ of habeas corpus on the grounds that he was not represented by counsel when brought before the court on proceedings to revoke his probation. He was indigent at all times. The writ was denied and he took an appeal to the Supreme Court of Nevada which ruled that a court need not appoint counsel for an indigent on a proceeding to revoke probation.

The court, in the course of its opinion, stated in part as follows:

> "Here, of course, the constitutionality of the underlying conviction is not questioned. The petitioner's guilt of the underlying crime was constitutionally established. On a proceeding

to revoke probation, the court is not concerned with the probationer's guilt or innocence of the underlying crime. Rather, its sole concern is whether the privilege of probation should be revoked because of the failure to meet the conditions imposed. And, if revocation is ordered, the sentence he is required to serve is punishment for the underlying crime rather than for his failure to comply with the terms of probation. *Brown v. Warden, U. S. Penitentiary*, 351 F.2d 564 (7th Cir. 1965). For these reasons, decisions regarding the federal constitutional right to counsel at various stages of a criminal prosecution are not controlling. Cf. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Hamilton v. State of Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961); *White v. State of Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963); *Escobedo v. State of Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964); *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). In the cases just cited, the denial of counsel was deemed to have destroyed the validity of the conviction. That consideration is not present on a proceeding to revoke probation.

In the federal law, probation is a privilege granted by Congress. The source of the probationer's privilege is to be found in the Federal Probation Act. One convicted of crime is not given a right to probation by the federal Constitution. *Burns v. United States*, 287 U.S. 216, 53 S.Ct. 154, 77 L.Ed. 266 (1932); *Escoe v. Zerbst*, 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed.

1566 (1935); *Brown v. Warden U. S. Penitentiary, supra; Welch v. United States,* 348 F.2d 885 (6th Cir. 1965); *United States v. Huggins,* 184 F.2d 866 (7th Cir. 1950); *Gillespie v. Hunter,* 159 F.2d 410 (10th Cir. 1947); *Bennett v. United States,* 158 F.2d 412 (8th Cir. 1946). Accordingly, the rights of an offender in a proceeding to revoke his conditional liberty under probation or parole are not coextensive with the federal Constitutional rights of one accused in a criminal prosecution. *Hyser v. Reed,* 115 U.S. App. D. C. 254, 318 F.2d 225 (1963); *Richardson v. Markley,* 339 F.2d 967 (7th Cir. 1965); *Brown v. Warden, U. S. Penitentiary, supra.*"

Another case finding that the right to counsel does not apply in probation revocation hearings is *Brown v. Warden, United States Penitentiary,* 351 F.2d 564 (CCA 7, 1965), Cert. den. 382 U.S. 1028 in which the court stated in the course of its opinion, in part, as follows:

"An offender's rights under the Federal Probation Act have been construed in *Burns v. United States,* 287 U.S. 216, 53 S.Ct. 154, 77 L.Ed. 266 (1932) and in *Escoe v. Zerbst,* 295 U.S. 490, 55 S.Ct. 818, 79 L.Ed. 1566 (1935). The act is intended to provide a period of grace in order to aid the rehabilitation of a penitent offender. Probation is conferred as a privilege and cannot be demanded as a matter of right. The offender stands convicted and faces punishment. The source of his rights under the Federal Probation Act lies in the

legislative mandate, not in the Constitution of the United States.

"Congress has declared that a probationer accused of violating his probation 'shall be taken before the court for the district having jurisdiction over him.' Section 3653, Title 18 U.S.C.A. Although no trial in any strict or formal sense is required, the legislative directive that the accused probationer shall be taken before a court means that—

> "' * * * there shall be an inquiry so fitted in its range to the needs of the occasion as to justify the conclusion that discretion has not been abused by the failure of the inquisitor to carry the probe deeper.'

Escoe v. Zerbst, 295 U.S. at 493, 55 S.Ct. at 820.

"The inquiry of the court at such hearing is not directed to the probationer's guilt or innocence in the underlying criminal prosecution, but to the truth of the accusation of a violation of probation. Has the probationer abused the privilege of the period of grace extended to him to aid him in rehabilitation?

"Liberty on probation is conditioned on the observance of certain conduct. A breach of the required conduct—not necessarily the commission of a crime—constitutes a violation and serves to terminate the privilege of conditional liberty. Although revocation results in the deprivation of the probationers' liberty, the sentence he may be required to serve is the punishment for the crime of which he had previously been found guilty * * *

"Thus, it appears that under the Federal Probation Act as construed by the Supreme Court, the source and nature of the offender's rights and the issue before the court on hearing of revocation of probation differ from those on imposition of sentence in a criminal prosecution. It follows that an offender who has already been adjudged guilty and sentenced is not entitled to counsel as a matter of right under the Sixth Amendment of the Constitution of the United States or under Rule 44 of the Federal Rules of Criminal Procedure in the hearing on revocation wherein it is determined whether or not he has forfeited the privilege of conditional liberty. *Welsh v. United States*, 348 F.2d 885 (6th Cir. 1965); *United States v. Huggins*, 184 F.2d 866, 868 (7th Cir. 1950); *Gillespie v. Hunter*, 159 F.2d 410 (10th Cir. 1947); *Bennett v. United States*, 158 F.2d 412 (8th Cir. 1946). Decisions concerned with the constitutional right to counsel of an accused at various stages of criminal prosecutions are not controlling. Cf. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *United States v. Tribote*, 296 F.2d 598 (2d Cir. 1961)."

In *Kennedy v. Maxwell* (1964), 176 Ohio St. 215, 198 N.E. 2d 658, 659, 660, the court there stated in part on the right to counsel in probation revocation hearings:

"Finally, petitioner argues that his sentence was void because he did not have counsel appointed to represent him at the hearing on the revocation of his probation. The right to

appointment of counsel relates only to the actual trial of the accused. Once one is convicted and placed on probation, his trial is terminated, and one does not have the right to have counsel appointed to represent him on a subsequent hearing for the revocation of his probation. *Thomas v. Maxwell, Warden*, 175 Ohio St. 233, 193 N.E. 2d 150."

And in *United States v. Huggins*, (7th CCA 1950) 184 F.2d 866, 868 the court stated in part:

"Whether the ends of justice will best be met by a revocation of probation is a matter of discretion with the trial court, and a probationer when brought before the court for such determination without being furnished counsel, has not been deprived of his constitutional right. *Gillespie v. Hunter*, 159 F.2d 410."

In *People v. Wood*, 2 Mich. App. 342, 139 N.E.2d 895, 897 (1966) the court stated in part:

"In response to the question as to whether a defendant has a right to counsel at a hearing on probation revocation, we believe that under present interpretation of appellate courts, the answer is that there is no guarantee of right to counsel at such hearing."

In *Welsh v. United States*, (CCA 6, 1965) 348 F.2d 885, 887, that court, in commenting on the constitutional right to the assistance of counsel in probation revocation matters in federal courts, stated in the course of its opinion in part as follows:

"Petitioner also contends that he was deprived of his constitutional right to assistance of counsel at the hearing when probation was

revoked. In addition to the fact that petitioner made no request for counsel at that hearing, the constitutional right to the assistance of counsel in the defense of a criminal prosecution, given by the Sixth Amendment, does not apply to a hearing on a motion to revoke probation. *Bennett v. United States*, 158 F.2d 412, 415, C.A. 8th, cert. denied 331 U.S. 822, 67 S.Ct. 1302, 91 L.Ed. 1838; *Gillespie v. Hunter*, 159 F.2d 410, 411 C.A. 10th; *United States v. Huggins*, 184 F.2d 866, 868, C.A. 7th; *Crowe v. United States*, 175 F.2d 799, 801, C.A. 4th, Cert. denied 338 U.S. 950, 70 S.Ct. 478, 94 L.Ed. 586, rehearing denied 339 U.S. 916, 70 S.Ct. 559, 94 L.Ed. 1341; *Richardson v. United States*, 199 F.2d 33, 35, C.A. 10th; *Cupp v. Byington*, 179 F. Supp. 669, 670, S.D. Ind. See: *Gilpin v. United States*, 265 F.2d 203, and cases cited at page 204, C.A. 6th; *Barker v. State of Ohio*, 330 F.2d 594, and cases cited, C.A. 6th."

Other cases which have arrived at substantially the same conclusion are *Franklin v. State*, 87 Idaho 2991, 392 P.2d 552 (1964); *State v. Edelblute*, — Idaho —, 424 P.2d 739 (1967); *Ex parte Levi*, 39 Calif., 2d 41, 244 P.2d 403; *Johnson v. Tinsley*, 234 F. Supp. 866, (D.C. Colo., 1964), affirmed 337 F.2d 856.

Although, these cases are concerned only with the right to counsel at a hearing on the revocation of probation, the conclusion is inescapable that the decision will also bear upon the rights of parolees at hearings relative to the revocation of parole or conditional pardon and perhaps, it would even bear

upon the rights of prisoners at disciplinary hearings within correctional institutions resulting in a change of custody or deprivation of privileges. In *Hyser v. Reed*, 318 F.2d 225, (D.C. Cir.), cert. den, 375 U.S. 957 (1963) an excellent discussion is found on the rights of federal parolees before the United States Board of Parole. The court discusses and denies to the parolee the right to court-appointed counsel, the right to confrontation and cross-examination of witnesses and right to compulsory process to obtain witnesses.

A case which is also noteworthy is *Roberts v. United States*, 320 U.S. 264. In that case the issue was whether or not the district court, under the federal probation act was authorized to set aside, following the revocation of probation, a sentence previously imposed and to impose a new sentence with a harsher penalty. The authority of the district court was challenged by the petitioner on two grounds; (1), that the interpretation of the Probation Act did not contain the authority to increase the penalty once imposed; and (2), if the probation act is construed to grant the district courts that authority, the increased sentence violated the double jeopardy clause of the Fifth Amendment.

It was decided by the court that the Probation Act did not confer upon the courts the power to increase a sentence previously imposed following the revocation of probation.

The court, through Mr. Justice Black, stated in part, as follows:

> "To construe the Probation Act as not permitting the increase of a definite term of imprisonment fixed by prior valid sentence gives full meaning and effect to both the first and second sections of the Act. In no way does it impair the Act's usefulness as an instrument to accomplish the basic purpose of probation, *namely to provide an individualized program offering a young or unhardened offender an opportunity to rehabilitate himself without institutional confinement under the tutelage of a probation official and under the continuing power of the court to impose institutional punishment for his original offense in the event that he abused this opportunity. To accomplish this basic purpose Congress vested wide discretion in the courts.* See *Burns v. United States*, 287 U.S. 216, 77 L.Ed. 266, 53 S.Ct. 154. * * *" (Emphasis ours)

In the dissent of the late Mr. Justice Frankfurter, concurred in by the Chief Justice and Mr. Justice Reed, the following observation was made:

> "It would be strange if the Constitution stood in the way of a system so designed for the humane treatment of offenders. To vest in courts the power to adjust the consequences of criminal conduct to the character and capacity of an offender, as revealed by a testing period of probation, of course does not offend the safeguard of the Fifth Amendment. * * *
>
> But to set a man at large after conviction on condition of his good behavior and on default

of such condition, to incarcerate him, is neither to try him twice nor to punish him twice. *If Congress sees fit, as it has seen fit, to employ such a system of criminal justice there is nothing in the Constitution to hinder.*" (Emphasis ours)

Although not directly in point on its facts, some of the thoughts expressed in the case of *Williams v. New York*, 337 U.S. 241 (1949) are pertinent to the considerations before the court in the cases at bar. Williams was convicted of the crime of MURDER IN THE FIRST DEGREE in a New York Court by a verdict of a jury, which recommended life imprisonment, but the judge, pursuant to the authority of a New York Statute, imposed the death sentence. A hearing was held before the trial judge at the time of the imposition of sentence, and the petitioner was represented by three attorneys who gave arguments concerning the death penalty and requesting the court to follow the recommendation of the jury and impose a sentence of life imprisonment. The trial judge, under the New York sentencing statute, has the discretion to consider information about the convicted person's life, health, habits, conduct, mental and moral propensities obtained through outside sources which a defendant is not permitted to confront or cross examine. The petitioner appealed to the New York Court of Appeals, contending that the statutory procedure for the imposition of sentence as applied in New York, was in violation of the due process clause of the Fourteenth Amendment, on the

basis that it was imposed upon information supplied by witnesses whom the accused had not been confronted with, and to whom he had no opportunity of cross examination or rebuttal. The same challenge was made before the Supreme Court of the United States, and, in the opinion of the court by Mr. Justice Black, the following statements are found:

> "Appellant urges that the New York statutory policy is in irreconcilable conflict with the underlying philosophy of a second procedural policy grounded in the due process of the law clause of the Fourteenth Amendment. That policy, as stated in *In re Oliver*, 333 U.S. 257, 273, 92 L.Ed. 682, 694, 68 S. Ct. 499, is in part that no person shall be tried and convicted of an offense unless he is given reasonable notice of the charges against him and is afforded an opportunity to examine adverse witnesses. That the due process clause does provide these salutary and time-tested protections where the question *for consideration is the guilt of a defendant seems entirely clear from the genesis and historical evolution of the clause. Chamber v. Florida*, 309 U.S. 227, 236, 237, 84 L.Ed. 716, 721, 722, 60 S.Ct. 472, and authorities cited in Note 10. (Emphasis ours)
>
> "Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and

types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law. * * *
A recent manifestation of the historical latitude allowed sentencing judges appears in Rule 32 of the Federal Rules of Criminal Procedure. That rule provides for consideration by federal judges of reports made by probation officers containing information about a convicted defendant, including such information 'as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant.' * * * The practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy. Execution of the United States parole system rests on the discretion of an administrative parole board. (citing the statutory authority) Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.

"Modern changes in the treatment of offenders make it more necessary now than a century ago for observance of the distinctions in the evidential procedure in the trial and sentencing processes. For indeterminate sentences in probation have resulted in an increase in the discretionary powers exercised in fixing punishment. * * *

"The considerations we have set out admonish us against treating the *due process clause as a uniform command that courts throughout the Nation abandon their age-old practice of seeking information from out-of-court sources to*

*guide their judgment toward a more enlightened and just sentence. * * * The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure. So to treat the due process clause would hinder if not preclude all courts—state and federal—from making progressive efforts to improve the administration of criminal justice. Escoe v. Zerbst*, 295 U.S. 490, 79 L.Ed. 1566 (1935)." (Emphasis supplied)

If the right to counsel exists, for the aid of convicted persons at probation revocation hearings, it would seem clear that such right is not derived through the Sixth Amendment to the Constitution of the United States as made applicable to the states by its incorporation into the Fourteenth Amendment to the Constitution of the United States.

The Sixth Amendment to the Constitution of the United States provides in part:

> "In all, *criminal prosecutions*, the *accused* shall enjoy the right * * * to have the assistance of counsel for his defence".

It is undisputed that the petitioners, *Mempa* and *Walkling*, were convicted upon their pleas of "Guilty" of the crimes respectively of TAKING A MOTOR VEHICLE WITHOUT THE PERMISSION OF THE OWNER AND BURGLARY IN THE SECOND DEGREE, and during all of the proceedings leading to their convictions, they were accorded all of their constitutional rights, including representation by counsel. Manifestly, it must follow that upon conviction of the

crimes of which they were charged, the petitioners ceased to be "accused" persons, and, as well, at that point, the "criminal prosecutions" terminated, insofar as those terms are employed in the Sixth Amendment to the Constitution of the United States.

A probation revocation hearing has, for its basic purpose, the determination of the question of whether the probationer has breached the trust vested in him, by the court at the time of the grant of probation and its conditions violated. The hearing on revocation of probation does not partake of the formalities of procedure that are customarily applied in criminal prosecutions. *Escoe v. Zerbst, supra*; *Burns v. United States, supra.* If the court finds during the probation revocation hearing, that the probationer has been derelict in his observance of the conditions of his probation, the judgment and sentence may thereafter be imposed, which comes as a result of the conviction of the underlying crime and not the breach of the conditions of probation. The judgment of conviction and the resulting sentence of imprisonment have at all times been known or outstanding.

As this court stated in *United States v. Zucher*, 161 U.S. 475, the "Sixth Amendment" relates to a prosecution of an accused person which is technically criminal in nature. Also see *Hannah v. Lorche*, 36 U.S. 420, 440 (Note 16).

As well, it was held in *Levine v. United States*, 362 U.S. 610 that the Sixth Amendment was not applicable to criminal contempt proceedings even

though conviction could result in imprisonment. Also, to the same effect, *U. S. v. Barnett*, 376 U.S. 681.

The probation revocation hearings held in the cases of *Mempa* and *Walkling* before the courts of the State of Washington were not "criminal prosecutions", and they, as convicted persons, did not assume the role of "accused" persons within the meaning of those terms as found in the Sixth Amendment to the Constitution of the United States.

Accordingly, we respectfully submit that the petitioners here did not have a constitutional right to the assistance of counsel in their respective probation revocation hearings under the authority of the Sixth Amendment to the Constitution of the United States as made applicable to the states by its incorporation into the Fourteenth Amendment to the Constitution of the United States.

I

RIGHT TO COUNSEL AT PROBATION REVOCATION HEARINGS

B. Due Process

SUMMARY OF ARGUMENT

The right of the petitioner to not be deprived of their liberty without due process of law was decided at the time of their convictions of having committed their respective crimes against society. The grant and revocation of probation did not have the effect of reviving or otherwise transforming this right so as to enable them to insist upon these rights anew.

The fact that these petitioners are convicted persons and the criminal prosecutions which lead to the convictions of the crimes of which they have been charged, are not drawn in issue before this court, is the distinguishing factor between these cases and this court's decisions concerning the right to counsel in *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Escobedo v. Illinois*, 378 U.S. 478; *Miranda v. Arizona*, 384 U.S. 436 (1966); *Powell v. Alabama*, 287 U.S. 45 (1932); *White v. Maryland*, 373 U.S. 59 (1963) and *In re Gault*, 387 U.S. — , 18 L.Ed.2d 527, 87 S.Ct. 1428 (May 15, 1967).

At the time the petitioners were before the courts of the State of Washington and the courts granted the petitioners the privilege of probation, and at all times thereafter, the petitioners were convicted persons, and no question remained of their

guilt or innocence. Their release to conditional liberty on probation is a privilege granted under the statute, which may be exercised at the discretion of the trial court and probation once granted, does not thereafter become transformed to a right.

Speaking to this point in *Burns v. United States*, 287 U.S. 216 (1932) the court stated:

> "There is no suggestion in the statute that the scope of the discretion conferred for the purpose of making the grant is narrowed in providing for its modification or revocation. The authority for the latter purpose immediately follows that given from the former, and is, in turn, equally broad. The court may revoke or modify any condition of probation, or may change the period of probation. There are no limiting requirements as to formulation of charges, notice of charges, or manner of hearing or determination. No criteria for modification or revocation are suggested which are, in addition to, or different from those which pertain to the original grant. The question in both cases is whether the court is satisfied that its action will subserve the ends of justice to the best interest of both the public and the defendant. * * *"

At the time of the petitioners' convictions of the crimes of which they had been charged, they, thereafter, became liable to serve a term of imprisonment and their Fourteenth Amendment right not to have the state "deprive any person of * * * liberty * * * without due process of law" had been fulfilled.

In *Gideon v. Wainwright, supra*, and the other cases cited in the first paragraph of this section of the brief, the court has decided that in those cases where a person who has either been accused of committing a crime, or of juvenile delinquency, or under certain circumstances, when in custody in respect to either, he is entitled to have the aid and assistance of a lawyer for the protection of his interests, then and at the time of his trial, if, in the case of juvenile delinquency, it may result in a period of confinement.

The petitioners here are not accused persons, in the sense of *Gideon v. Wainwright*, and the other cases cited above, their guilt of the crimes charged has been established. Further, the petitioners were not subjected to the formalities and complexities of a formal trial, when brought before the court for a hearing relative to the revocation of their probations. The intricacies of an Information or Indictment are not a part of a probation revocation matter, the hearing is not before a jury and is customarily informal, the quantum of proof of a breach of the conditions of probation, is not proof beyond a reasonable doubt, but merely sufficient to satisfy the court that the probationer has violated the terms of his probation. The only requirement in a probation revocation hearing is that the exercise of judicial discretion by the court in such matters be fair and not arbitrary or capricious, and in keeping with that measure of "fundamental fairness" that due process of law requires.

There has been no showing by the petitioners here of fundamental unfairness in the probation revocation hearings held in the petitioners' cases.

We respectfully submit that the "due process of law" clause of the Fourteenth Amendment to the Constitution of the United States did not confer upon these petitioners a right to court-appointed counsel to be paid for at public expense in their respective probation revocation hearings.

I

RIGHT TO COUNSEL AT PROBATION REVOCATION HEARINGS

C. Equal Protection of the Laws

SUMMARY OF ARGUMENT

A probation revocation hearing is not a criminal prosecution; there is no question of guilt or innocence, nor is the probationer discriminated against by the lack of counsel, he has his hearing, which is uncomplicated by formalities and the intricacies of pleading and briefs. Unlike Douglas v. California, 372 U.S. 353 lack of counsel does not frustrate his opportunity to be heard. An invidious discrimination is absent here.

It is claimed by petitioner that the procedures in the State of Washington, in not providing for court-appointed counsel and the advice of that right in probation revocation hearings, has denied them "equal protection of the laws" within the meaning of the Fourteenth Amendment to the Constitution of the United States.

Admittedly, RCW 9.95.220 (a) requires that a probationer who is charged with a violation of the conditions of probation must be "brought before the court" and hearings are held in court relative to the alleged violations and retained counsel do appear in these proceedings. However, the Probation Act, (RCW 9.95.200 - 240, Appendix A) makes no mention whatsoever of counsel for probationers at probation revocation hearings, either counsel appointed by the court, or counsel retained by probationers.

The principles which the equal protection of the laws clause of the Fourteenth Amendment evokes, as set forth in *Griffin v. Illinois*, 351 U.S. 12 have previously been applied to the appellate procedures involving indigent defendants in the courts of the State of Washington. *Eskridge v. Washington State Board of Prison Terms and Paroles*, 357 U.S. 214; *Draper v. Washington*, 372 U.S. 487 and *Woods v. Rhay*, 357 U.S. 575.

In *Griffin v. Illinois, supra, Eskridge v. Washington, supra,* and *Woods v. Rhay, supra,* the court was concerned with the constitutional right of indigent defendants to free transcripts on appeal.

In *Draper v. Washington, et al.*, 372 U.S. 487 the court, in an opinion by Mr. Justice Goldberg, discussed the conclusions of *Griffin and Eskridge* to be as follows:

> "* * * The principle of Griffin is that '(d)estitute defendants must be afforded as adequate appellate review as defendants who

have money enough to buy transcripts,' 351 U.S., at 19, a holding restated in Eskridge to be 'that a state denies a constitutional right guaranteed by the Fourteenth Amendment if it allows all convicted defendants to have appellate review except those who cannot afford to pay for the records of their trials,' 357 U.S., at 216. In Eskridge the question was the validity of Washington's long-standing procedure whereby an indigent defendant would receive a stenographic transcript at public expense only if in the opinion of the trial judge, 'justice will thereby be promoted.' Id. 357 U.S. at 215. This Court held per curiam that, given Washington's guarantee of the right to appeal to the accused in all criminal prosecutions, Wash. Const. Art. I, § 22 and Amend 10, '(t)he conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript,' Id. 357 U.S. at 216, and remanded the cause for further proceedings not inconsistent with the opinion."

In *Douglas v. California*, 372 U.S. 353, in an opinion for the court, delivered by Mr. Justice Douglas, the court struck down a California procedure which denied the indigent petitioner's request for counsel on appeal from their criminal prosecution in which the California Court of Appeals had "gone through" the record and determined that "no good whatever could be served by appointment of counsel." The court concluded in part:

> "* * * Where the merits of the *one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." (Emphasis ours)

All of the cases cited and quoted from above, are concerned with the "criminal prosecution" and the constitutional right to "the one and only appeal" an indigent defendant has from the determination of guilt of the criminal offense. Obviously, the cases at bar, present questions of a substantially different character, quality and magnitude from the Griffin case and the cases following and adopting the Griffin rationale. As we have taken some pains to point out earlier in this brief, a probation revocation hearing is a proceeding entirely separate and apart from the underlying criminal conviction and prosecution. The right to such a hearing is not derived from the constitution, but from the legislative authority contained in the Probation Act. RCW 9.95.220, (App. A) *Burns v. United States, supra, Escoe v. Zerbst, supra.* Furthermore, in contrast to an appeal from a criminal conviction as was involved in the Griffin case and its successors adopting this rationale, a probation revocation hearing is a simple uncomplicated process. The intricacies of an Information or Indictment are not involved; the formalities of trial and procedure are not present; the hearing customarily being informal, the strict rules of evidence are not applied. Of course, the preparation of an appeal and the presentation both in writing and orally to

an appellate court presents complications and requires a measure of expertise that a layman ordinarily does not possess. Such technical problems are not present in a probation revocation hearing. Unlike the failure to have a transcript of a record on appeal or to have counsel to give aid and assistance in the preparation of the written and oral presentation to the appellate court as were involved in Griffin, will likely completely prevent the defendant from enjoying his constitutional right to appellate review. This result would not follow where a probationer did not have counsel at a probation revocation hearing. He would have his hearing and likely would do as well, if not better, even though not represented by counsel.

The Probation Act of the State of Washington (App. A) makes no mention whatsoever in its provisions concerning representation by counsel, either retained by the probationer or appointed by the court to be paid for at public expense. We submit that there is not present in the Washington Law an "invidious discrimination". *Williamson v. Lee Optical of Oklahoma, Inc.*, 348, U.S. 483. The equal protection clause does not demand that the statutes and laws of the several states require that there be absolute equality between the rich and poor in the formulation and application of the laws of their respective states. Nor, does it prevent the state "from adopting a law of general applicability that may affect the poor more harshly than it does the rich, or, on the other hand,

from making some effort to redress economic imbalances while not eliminating them entirely." *Douglas v. California*, 372 U.S. at 361.

We feel that the rationale and philosophy expressed in *Griffin v. Illinois*, *supra*, and *Douglas v. California*, *supra*, should not be applied here, for the denial of the right to court-appointed counsel does not arise by force of the language of the Washington Probation Act, but, by custom and practice and where the hearing is a statutory right, not having its basis in the Constitution, and as well, the right to hearing is not totally frustrated in the absence of court-appointed counsel. Accordingly, we respectfully submit that the petitioners, *Mempa* and *Walkling* were not denied their constitutional right to "equal protection of the laws" within the meaning of the Fourteenth Amendment to the Constitution of the United States when the courts of the State of Washington did not provide them with counsel to be paid for at public expense at their probation revocation hearings or to advise them of their rights in this respect.

II

RIGHT TO COUNSEL AT TIME OF THE IMPOSITION OF SENTENCE FOLLOWING THE REVOCATION OF PROBATION.

A. Due Process Considerations.

SUMMARY OF ARGUMENT

The imposition or execution of sentence and commitment to prison following the revocation of probation is required by statute. The sentence of the court is fixed by statute, there can be no mitigation of such sentence. In the absence of a showing by petitioners of substantial prejudice or fundamental unfairness at the time of the imposition of sentence without counsel or advice of that right, there has been no denial of due process.

After the court revokes probation the statutes of Washington (RCW 9.95.220, set forth in full in App. A) require the court to take the following steps:

> "* * * In the event the judgment has been pronounced by the court and the execution thereof suspended, the court may revoke such suspension, whereupon the judgment, shall be in full force and effect, and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory as the case may be. If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed."

The statute (quoted in part above) makes it plain, that if the court revokes probation, the defendant must then be sentenced and committed to the state penitentiary or state reformatory. No discretion in this respect is vested in the trial court and the sentence is fixed by statute—the court fixes the maximum sentence only (RCW 9.95.010) and the Board of Prison Terms and Paroles fixes the minimum duration of confinement. (RCW 9.95.040) The imposition of sentence or the execution of a sentence previously pronounced as prescribed in the Probation Act occurs at the probation revocation hearing and is as much a part of that hearing as the proceedings concerning the violation of the conditions of probation and, therefore, is not a part of the criminal prosecution.

In the absence of a showing of fundamental unfairness in the probation revocation hearings followed by the imposition of sentence in these cases, we submit that the petitioners have not suffered a deprivation of their right to "due process of law."

In *Townsend v. Burke*, 334 U.S. 736 relied on by the petitioners, was a case in which this court decided that the petitioner there, being uncounseled at the time of sentencing was, under the circumstances, denied that measure of "fundamental fairness" required by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Townsend had been convicted in the State of Pennsylvania of two charges of ROBBERY and two

charges of BURGLARY. At all times he was unrepresented by counsel and was not advised of a right to counsel nor offered the assignment of counsel at public expense. He petitioned the Supreme Court of Pennsylvania for writ of habeas corpus which was denied and certiorari was granted by the Supreme Court of the United States.

Following the petitioner's plea of Guilty to certain of the charges made against him, the following action took place in the trial court:

"By the Court (addressing Townsend):

"Q. Townsend, how old are you?

"A. 29.

"Q. You have been here before, haven't you?

"A. Yes sir.

"Q. *1933, larceny of automobile.* 1934, larceny of produce. 1930, larceny of bicycle. 1931, entering to steal and larceny. *1938, entering to steal and larceny in Doylestown.* Were you tried up there? No, no, Arrested in Doylestown. That was up on Germantown Avenue, wasn't it? You robbed a paint store.

"A. No. That was my brother.

"Q. You were tried for it, weren't you?

"A. Yes, but I was not guilty.

"Q. And 1945, this. 1936, entering to steal and larceny, 1350 Ridge Avenue. Is that your brother too?

"A. No.

"Q. *1937, receiving stolen goods, a saxophone.* What did you want with a saxophone?

Didn't hope to play in the prison band then, did you?

"THE COURT: Ten to twenty in the Penitentiary."

"The trial court's facetiousness casts a somewhat somber reflection on the fairness of the proceeding when we learn from the record that actually the charge of receiving the stolen saxophone had been dismissed and the prisoner discharged by the magistrate. But it savors of foul play or of carelessness when we find from the record that, on two others of the charges which the court recited against the defendant, he had also been found not guilty. Both the 1933 charge of larceny of an automobile, and the 1938 charge of entry to steal and larceny, resulted in his discharge after he was adjudged not guilty. We are not at liberty to assume that items given such emphasis by the sentencing court, did not influence the sentence which the prisoner is now serving.

"We believe that on the record before us, it is evident that this uncounseled defendant was either overreached by the prosecution's submission of misinformation to the court or was prejudiced by the court's own misreading of the record. Counsel, had any been present, would have been under a duty to prevent the court from proceeding on such false assumptions and perhaps under a duty to seek remedy elsewhere if they persisted. Consequently, on this record we conclude that, while disadvantaged by lack of counsel, this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue.

Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand.

"We would make clear that we are not reaching this result because of petitioner's allegation that his sentence was unduly severe. The sentence being within the limits set by the statute, its severity would not be grounds for relief here even on direct review of the conviction, much less on review of the state court's denial of habeas corpus. It is not the duration or severity of this sentence that renders it constitutionally invalid; it is the careless or designed pronouncement of sentence on a foundation so extensively and materially false, which the prisoner had no opportunity to correct by the services which counsel would provide, that renders the proceedings lacking in due process.

"Nor do we mean that mere error in resolving a question of fact on a plea of guilty by an uncounseled defendant in a non-capital case would necessarily indicate a want of due process of law. Fair prosecutors and conscientious judges sometimes are misinformed or draw inferences from conflicting evidence with which we would not agree. But even an erroneous judgment, based on a scrupulous and diligent search for truth, may be due process of law.

"In this case, counsel might not have changed the sentence, but he could have taken steps to see that the conviction and sentence were not predicated on misinformation or misreading of court records, a requirement of fair

play which absence of counsel withheld from this prisoner."

We respectfully submit that the records in these cases most certainly do not show any foul play or overreaching upon any of the matters relating to the petitioners in these cases and no allegations in that direction are made by the petitioners, and we submit that on that basis, the petitioners' right to "due process of law" has not been violated.

II

RIGHT TO COUNSEL AT TIME OF THE SENTENCING FOLLOWING THE REVOCATION OF PROBATION

B. Equal Protection of the Laws

SUMMARY OF ARGUMENT

Uncounseled convicted persons, including petitioners, who have had their probations revoked and judgment and sentence imposed upon a plea of guilty, cannot be said to have suffered an invidious discrimination constituting a denial of equal protection of the laws when all things occurring and subject to remedial action would have happened during the period when they were represented and advised by lawyers. The only exception would be in regard to the probation revocation hearing which is subject to very narrow review on appeal.

We submit that the "equal protection of the laws" clause does not impose on the State of Washington an "affirmative duty to lift the handicaps

flowing from differences in economic circumstances". Although the "state may have a moral obligation to eliminate the evils of poverty, but it is not required by the equal protection clause to give to some, what others can't afford." *Douglas v. California*, 372 U.S. 353, 362.

Whether or not there has been a denial of "equal protection of the laws", is in our belief, dependent upon the circumstances, and if such circumstances amount to a discrimination inimical to that measure of fair play that our system of American Jurisprudence requires.

What then can counsel do for a defendant at sentencing following revocation of probation under the law of the State of Washington?

As we have earlier observed, there can be no mitigation of sentence, and sentence must be mandatorily imposed or executed on revocation of probation. The term of the sentence is fixed by law, there can be little chance for the entry of an erroneous sentence.

Motions may be made at this time, regardless of whether sentence has been entered or not, for change of plea from "guilty" to "not guilty." RCW 10.40-.175, *State v. McLaughlin*, 59 Wn.2d 865, 371 P.2d 55. Such motions are addressed to the sound discretion of the trial court. *State v. Taft*, 49 Wn.2d 98, 297 P.2d 1116. Denial of motions for change of plea constitute an abuse of judicial discretion, only where a substantial right of the defendant has been in-

vaded or his constitutional rights have been violated. *State v. Rose*, 42 Wn.2d 509, 256 P.2d 493.

Respecting the possibilities of motions for changes of pleas in the petitioners' cases, it must be remembered, that they were represented by counsel at the time of the entry of their pleas of "guilty." And, it must be necessarily and, in fairness to all attorneys, be presumed that they perform their duties to criminal defendants in keeping with the canons of legal ethics and their oath on becoming members of the bar. If then, these counseled petitioners, at the time of plea, had suffered a violation of their rights, constitutional or otherwise, it would have been known to counsel and appropriate remedial action taken.

Admittedly, in Washington, the right to appeal arises at the time of the entry of judgment and sentence when the imposition of sentence has been deferred, *State v. Farmer*, 39 Wn.2d 675, 237 P.2d 734, but, if sentence has been pronounced but the execution of the sentence suspended (as may be the situation in Mempa,) then the time within which to exercise the right of appeal commences at the time of the pronouncement of sentence. *State v. Lilliopoulous*, 165 Wash. 197, 5 P.2d, 319.

An appeal from a judgment and sentence entered upon a plea of Guilty is exceedingly limited in its scope, and only those matters which amount to an invasion of a substantial right, or a denial of a constitutional right are reviewable on appeal. *State*

v. Rose, supra. Again, any appealable errors would have been known to counsel who represented the petitioners at the time of their arraignment and plea and appropriate action taken by such attorneys.

We submit the motion to change plea and to appeal from a judgment and sentence on a plea of guilty, which were available to these petitioners, (with the possible exception of Mempa) are possibilities in their cases, which are empty of substance, and, if they were real possibilities, they were known when represented by counsel.

The only area which an attorney might be able to exercise judgment upon, relative to an appeal, is in regard to whether the court has abused its discretion in revoking probation. But, even here, the limitations on review are such that few appellants can hope for success. In *State ex rel. Woodhouse v. Dore*, 69 W.D.2d 64, 416 P.2d 670, the court stated on this point as follows:

> "Once the fact of guilt has been established in accordance with due process of law, as it was here by a plea of guilty competently made, all further proceedings of a judicial nature, except where prescribed by statute, fall within the court's broad discretionary powers. Although the defendant may be heard on such matters as the granting, denial or revocation of probation, the hearing need not meet the standards of due process prescribed for the trial of criminal cases. It is sufficient if the defendant is apprised of the reasons for and facts upon which the contemplated revocation depends and is

given fair opportunity to be heard in defense, refutation, or explanation of them. But the right to be heard does not include a correlative right to a formal trial.

"If the record discloses sufficient facts warranting a judicial officer to reasonably conclude that the probation has been a failure or in the words of the statute (RCW 9.95.220) that the probationer is '*violating the terms of his probation*, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious life,' then the courts of review are not to substitute their discretion in the premises for that of the sentencing judge. * * *"

Furthermore, there is no showing here that the lack of counsel by either petitioner resulted by reason of his economic situation and preventing him from retaining counsel of his own choosing. In fact, in Walkling, the petitioner advised the court that he desired to retain counsel and was given a continuance for that purpose, but his counsel, Smith Troy, did not appear at the time the matter was called for hearing. (W.R. 8)

Accordingly, we respectfully submit that the record does not show, in either of these cases, that the petitioners were discriminated against upon the basis of their financial inability to procure the services of counsel to give aid and assistance to them at the time of the probation revocation hearing followed by the imposition of sentence contrary to the "equal protection of the laws" clause of the Fourteenth Amendment to the Constitution of the United States.

III

WAIVER OF RIGHT TO COUNSEL

SUMMARY OF ARGUMENT

Waiver is not relied upon by Respondents as a defense in these cases.

The Supreme Court of the State of Washington in *Mempa v. Rhay*, 68 Wn.2d 882, 891, 416 P.2d 104 (M.R. 48) stated in connection with the principle of waiver, as follows:

> "A criminal defendant adequately represented by counsel, who, with counsel at his side, upon the entry of a plea of Guilty or in the trial culminating in conviction accepts probation status, does so on the basis of the existing statutes. These clearly authorize termination of probation and imposition of sentence without notice and without reference to allegations of denial of constitutional rights, admittedly pertaining to more orthodox criminal proceedings in the trial courts of this state. *In such a context it may even be said that there has been a waiver of any right to claim denial of criminal due process procedure in a proceeding involving termination of probation status and the imposition of sentence.* * * *" (Emphasis ours)

Although the point made by the Supreme Court in its opinion is most certainly worthy of consideration, it is not relied on by respondents in the defense of this matter. We readily recognize that the rule on waiver as pronounced by this court in *Johnson v. Zerbst*, 304 U.S. 458 and *Carnley v. Cochran*, 369

U.S. 506, requires that there must be knowledge of the rights or relinquishment of rights competently and intelligently made which must appear of record. If the records in these cases indicated that the courts had advised the petitioners of a right to counsel to be paid for at public expense which had been declined by the petitioners, or, if, at the time of the granting of probation by the respective courts, the petitioners had been advised that if they accepted probation, they would not be afforded the opportunity to have counsel at a probation revocation hearing to be paid for at public expense and then accepted probation, then the doctrine of waiver might be appropriate. However, these elements are absent from these cases and, therefore, the respondents do not rely on the doctrine of waiver in these cases consistent with the law pronounced in the above cited cases.

IV

JUDGMENT OF THE COURT

If this court should be of the opinion that the decisions of the Supreme Court of the State of Washington in these cases should be reversed and remanded, there are factors relating to the relief to be afforded in each of these cases which should be given consideration.

The petitioners have raised no constitutional issues relative to the constitutional validity of the conviction of the crime of TAKING A MOTOR VEHICLE

WITHOUT THE PERMISSION OF THE OWNER in the case of *Mempa*, or, the conviction in the *Walkling* case of the crime of BURGLARY IN THE SECOND DEGREE. The only constitutional challenge made by petitioners relates to the constitutional propriety of conducting their respective probation revocation hearings followed by the imposition of sentence without being afforded the opportunity to have court-appointed counsel to be paid for at public expense.

In the case of *Walkling*, No. 22, it should perhaps be noted, that his custodial status under the supervision of the respondent, THE WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES, is substantially the same as prevailed prior to the revocation of his probation. *Walkling* is, of course, now on parole and he is being supervised by the same agency, the respondent, THE WASHINGTON STATE BOARD OF PRISON TERMS AND PAROLES, that supervised him while he was on probation. The only difference between his custodial status when on probation, and now, while on parole, is that the question of his continued liberty is to be determined by the Board of Prison Terms and Paroles rather than the Superior Court of the State of Washington for Thurston County which was the situation while on probation. These factual circumstances in *Walkling* No. 22 may be suggestive of mootness.

However, if the court should take the position that the Supreme Court of the State of Washington has committed error of constitutional proportions

on the grounds alleged by the petitioners, we respectfully submit that the State of Washington should have the opportunity of either restoring the petitioners to the probation status which they were in prior to their challenged probation revocation hearings or, to conduct a new probation revocation hearing in these cases on the same grounds as were previously asserted for revocation of probation, affording them the right to counsel at public expense at such new hearing, and at the time of sentence, if that be the result of the revocation hearing.

CONCLUSION

WHEREFORE, the respondents conclude for the reasons appearing above, that the decision of the Supreme Court of the State of Washington in these cases should be affirmed.

Respectfully submitted,

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APPENDIX A

RCW 9.95.200—Probation by court—Board to investigate.

After conviction by plea or verdict of guilty of any crime, the court upon application or its own motion, may summarily grant or deny probation, or at a subsequent time fixed may hear and determine, in the presence of the defendant, the matter of probation of the defendant, and the conditions of such probation, if granted. The court may, in its discretion, prior to the hearing on the granting of probation refer the matter to the board of prison terms and paroles or such officers as the board may designate for investigation and report to the court at a specified time, upon the circumstances surrounding the crime and concerning the defendant, his proper record, and his family surroundings and environment. In case there are no regularly employed parole officers working under the supervision of the board of prison terms and paroles in the county or counties wherein the defendant is convicted by plea or verdict of guilty, the court may, in its discretion, refer the matter to the prosecuting attorney or sheriff of the county for investigation and report.

RCW 9.95.210—Conditions may be imposed on probation.

The court in granting probation, may suspend the imposing or the execution of the sentence and may direct that such suspension may continue for

such period of time, not exceeding the maximum term of sentence, except as hereinafter set forth and upon such terms and conditions as it shall determine.

The court in the order granting probation and as a condition thereof, may in its discretion imprison the defendant in the county jail for a period not exceeding one year or may fine defendant any sum not exceeding one thousand dollars plus the costs of the action, and may in connection with such probation impose both imprisonment in the county jail and fine and court costs. The court may also require the defendant to make such monetary payments, on such terms as it deems appropriate under the circumstances, as are necessary (1) to comply with any order of the court for the payment of family support, (2) to make restitution to any person or persons who may have suffered loss or damage by reason of the commission of the crime in question, and (3) to pay such fine as may be imposed and court costs, including reimbursement of the state for costs of extradition if return to this state by extradition was required, and may require bonds for the faithful observance of any and all conditions imposed in the probation. The court shall order the probationer to report to the board of prison terms and paroles or such officer as the board may designate and as a condition of said probation to follow implicitly the instructions of the board of prison terms and paroles. The board of prison terms and paroles will promulgate rules and regulations for the

conduct of such person during the term of his probation.

RCW 9.95.220—Violation of probation—Rearrest—Imprisonment.

Whenever the state parole officer or other officer under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates or living a vicious life, he shall cause the probationer to be brought before the court wherein the probation was granted. For this purpose any peace officer or state parole officer may rearrest any such person without warrant or other process. The court may thereupon in its discretion without notice revoke and terminate such probation. In the event the judgment has been pronounced by the court and the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory as the case may be. If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed.

RCW 9.95.230—Court revocation or termination of probation.

The court shall have authority at any time during the course of probation to (1) revoke, modify,

or change its order of suspension of imposition or execution of sentence; (2) it may at any time, when the ends of justice will be subserved thereby, and when the reformation of the probationer shall warrant it, terminate the period of probation, and discharge the person so held.

RCW 9.95.240—Dismissal of information or indictment after probation completed.

Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, may at any time prior to the expiration of the maximum period of punishment for the offense for which he has been convicted be permitted in the discretion of the court to withdraw his plea of guilty and enter a plea of not guilty, or if he has been convicted after a plea of not guilty, the court may in its discretion set aside the verdict of guilty; and in either case, the court may thereupon dismiss the information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of this right in his probation papers: *Provided*, That in any subsequent prosecution, for any other offense, such prior conviction may be pleaded and proved, and shall have the same effect as if probation had not been granted, or the information or indictment dismissed.

APPENDIX B

CERTIFICATION OF STATES JOINING RESPONDENTS AS AMICI CURIAE

I certify in accordance with Rule 42 that the Attorneys General named below have authorized in writing that their names and titles be appended to this brief on behalf of the states which they represent, and, as joining amici curiae the Honorable JOHN J. O'CONNELL, ATTORNEY GENERAL of the STATE OF WASHINGTON and STEPHEN C. WAY, ASSISTANT ATTORNEY GENERAL as Counsel for respondents, in support of the position taken in the foregoing brief on the issues presented.

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